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16 December 1993

Ms D Staunton
Chief Executive Officer
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Dear Ms Staunton

PROPOSED COMMONWEALTH TOBACCO LABELLING REGULATIONS

We refer to your letter of 25 November 1993.

You have sought our advice on possible grounds for challenging the proposed use of the Trade Practices Act ("TPA"), in particular ss 65C and 65D, to pass regulations giving effect to the labelling recommendations adopted by the Ministerial Council on Drug Strategy ("MCDS").

Section 65C

Section 65C(1)(a) prohibits, inter alia, the supply of goods which do not comply with a prescribed consumer product safety standard for goods of that kind. Breach of the prohibition gives rise to a criminal offence by virtue of section 79 and also gives rise to civil remedies, under ss 80 and 82.

A consumer product safety standard may arise from regulations authorised by s 65C(2) under s 172. Section 65C(2) provides that the regulations may make requirements, inter alia, as to the form and content of warnings to accompany the goods provided such "are reasonably necessary to prevent or reduce risk of injury to any person".

There are two limitations on the power to make regulations prescribing a consumer product safety standard, namely:

(1) the standard must relate to the matters listed, relevantly, the "form and content of markings, warnings or instructions to accompany the goods"; and

(2) the standard must be "reasonably necessary to prevent or reduce the risk of injury to any person".

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Consideration of regulations to give effect to the MCDS proposals must be undertaken in the light of these two limitations. First, it is necessary to consider whether the content of the material proposed to be published on cigarette packets constitutes in all respects "markings, warnings or instructions". Second, it is necessary to consider whether both the form and the content of the proposed material are reasonably necessary to prevent or reduce the risk of personal injury to any person.

As to the first limitation

The text proposed for publication on cigarette packs as set out in the report of the Centre for Behavioural Research and Cancer ("CBRC") is generally in the nature of a warning (ie a caution) and could not be said to constitute markings or instructions. The question arises; whether any of the text goes beyond that which may be regarded as "warnings".

The proposed texts:

(a) provide information concerning the availability of a "Quit Line";

(b) provide advice as to the beneficial consequences of quitting; and

(c) provide information concerning the adverse health consequences for other people (ie not the consumer) who are exposed to cigarette smoke.

As to these aspects of the proposed texts we advise:

(a) The provision of information concerning the availability of a "Quit Line" does not constitute a "warning". It does not serve to give notice of possible harm or anything unfavourable. It serves to advertise the services of the Quit organisation. Accordingly, we are of the opinion that should regulations require information concerning the availability of a "Quit Line" to be published on cigarette packs the regulations would, to this extent, be beyond power.

(b) The provision of advice concerning the reduction in risk achieved by quitting relates indirectly to the health risks of smoking. It is in the nature of a caution against continued smoking. Accordingly, we are of the opinion that this aspect of the proposed text is probably within power.

(c) The information provided concerning the health risks to other people does not constitute a warning concerning the adverse health consequences for the consumer. Accordingly, it might be argued that this information does not constitute a warning. However, we think such argument would fail. Section 65C is concerned with the risk of injury to "any person", ie consumers and others alike. Information given to a smoker concerning the perceived danger to others may influence the smoker to modify his or her smoking habit to situations where non-smokers are not being exposed to smoke. Accordingly, this information may be seen as giving notice of unfavourable consequences to "any person" and may also be seen as cautionary advice. For these

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reasons we think this aspect of the proposed text is within power.

As to the Second Limitation

This limitation raises the question whether the requirements of the anticipated regulations, both as to the form and content of the warnings, is "reasonably necessary to prevent or reduce risk of injury to any person". The expression "reasonably necessary" is aimed at striking a balance between the interests of consumers and the operation of free market forces.

The expression has been used in other statutory contexts. In the context of Health Insurance Act 1973 (Cth), medical services were defined as excessive when they "were not reasonably necessary for the adequate medical care of the patient concerned". In the context of the Workers Compensation Act 1987 (NSW) a worker's employer was liable to pay the cost of medical or related treatment incurred by a worker, as a result of an injury received by a worker, where it was "reasonably necessary that any medical or related treatment be given". In both contexts, the evaluation required to be undertaken by the Tribunal was, as to whether, the treatment went beyond that which was "reasonably necessary". The authorities that we have examined in respect of these two statutory provisions are not particularly apposite to the context of s 65C. They do however confirm that the expression imposes a limitation against excesses.

Review of dictionary definitions and paraphrasing the expression leads us to conclude that the expression "reasonably necessary" means: reasonably required but not excessive. What is reasonably necessary depends on a range of circumstances. For example, the following circumstances would seem relevant in the present case:

* the need, if any, for and likely effectiveness of the warnings;

* the alternative measures (both form and content) considered and/or available to communicate the warnings;

* the magnitude and seriousness of the risk of injury; and

* the costs and other adverse consequences suffered by the manufacturer as a result of the form and content of the warnings.

A determination of what is reasonably necessary requires an assessment of what is reasonable in all the circumstances of the product. Clearly some form of health warning will be considered reasonably necessary. The question remains in connection with the form of the warnings whether:

(a) the CBRC Report constitutes evidence which justifies the government concluding that the form of the warnings is reasonably necessary; and

(b) the form of the warnings and, in particular, the area of the pack to be occupied, is reasonably necessary or is excessive, having regard to all the circumstances.

It is open to argument that the CBRC Report, upon which the proposals are based, does not

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reasonably require the adoption of the CBRC Report recommendations. As you know a number of independent experts have critiqued the CBRC Report and have concluded that the conclusions reached by its authors are not justified by the research undertaken. These experts include: Associate Professor G Cooney, School of Behavioural Sciences, Macquarie University, Dr B Crabbe, Department of Psychology, University of Sydney, Professor G Eagleson, Australian Graduate School of Management, University of New South Wales, Dr R Fisher, The Northside Clinic, Sydney, Professor B Mouldren, Professor of Psychology, University of Western Australia, Dr R Power and School of Behavioural Sciences, Macquarie University. The expression "reasonably necessary" requires, in our opinion, the government to provide rational support for its decision. Donald and Heydon in their text on the TPA state: *"Since the consequences of non-compliance are criminal, the government should exercise its power to make regulations only where there is proven need for them and only after the commercial interests likely to be affected have been consulted."* We think this is somewhat of an overstatement of the position in the present context. Nonetheless, it does point to the need for the government to demonstrate a rational basis requiring the making of regulations. It would be open to the Institute and its members to challenge the regulations on the basis that the CBRC Report does not reasonably require the making of regulations to give effect to the recommendations contained in the Report.

Another ground for arguing that the anticipated regulations are excessive is based on the area of the pack to be occupied by the warnings. In support of this argument the evidence which would need to be considered would include:

* the alternative means of providing the same warning, eg a pack leaflet;

* the commercial impact of the regulations on the only remaining means of competitive advertising (ie brand image) available to cigarette manufacturers;

* the pack manipulation aspects of the CBRC Report, namely the attempt to make cigarette packs so unattractive as to dissuade people from smoking.

The first of these two arguments challenges the government to establish the need for the form of warnings required by the anticipated regulations. In respect of this challenge it seems to us that the onus is on the government to prove that the available evidence reasonably required it to promulgate the regulations. This may mean that the government would seek to rely on matters going beyond the content of the CBRC Report, for example, the estimated health costs and risks of smoking. These broad issues justify a warning of some type, but it seems that the government would have to rely on the CBRC Report in support of the precise form of the proposed warnings. In respect of this latter reliance it could be successfully argued that the CBRC Report does not, given the critiques available from independent experts, reasonably require the precise form of warnings.

We think the second of these two arguments, namely that concerned with the area occupied by the warnings especially when coupled with the first argument, has particular merit. The CBRC Report includes research which tested pack designs to render cigarette packs less attractive. Part of the rationale for the area taken up by the warnings is to render the packs less attractive and

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to reduce brand image. This is not reasonably necessary for a warning. The ulterior motive for the form of warning is not, in our view, permissible under s 65C(2).

The CBRC Report is, in part, concerned with "pack manipulation". The aim is to destroy brand image thereby decreasing the number of people who smoke. The introduction to the CBRC Report states:

> *"It is clear that cigarette packaging is an integral part of the image-promoting strategies used to attract people to specific brands. Clearly, brands do have images associated with them in the minds of young non-smokers, as well as experienced smokers. It seemed not unlikely that "loud" modifications necessary to maximise noticeability and legibility of warnings might jeopardise brand image and the attractiveness of cigarette packs - no bad thing from a public health perspective. In the study reported in Paper 10, we systematically showed young adolescents pictures of pairs of warning labels mocked up on actual cigarette packs, asking them to nominate the brand they would "least like to be seen with". This confirmed that prominent warnings on packs would discourage teenagers from use."*

The CBRC report also states:

> *"It has been argued that cigarette pack design might have important impact on teenagers and others who are thinking of starting to smoke. For example, Carr-Gregg and Gray (1990) argued that cigarette manufacturers go to some considerable trouble to make packs attractive and distinctive to consumers by endowing packs with a brand image by pack design and advertising. This produces a "store of value" in the design, making the pack itself a form of advertising. Similarly, Beede, Lawson and Shepherd (1991) also proposed that there was a "promotional impact" generated by cigarette packaging. That is, brand image in itself attracts individuals to experiment with smoking.*
>
> *The implication of this theorising is that changes in pack design would affect brand image and, unless they actually improved the image, would be expected to reduce whatever power the image had to promote experimental smoking.*
>
> *The two suggested strategies for reducing the power of brand image are:*
>
> *(a) plain packaging;*
>
> *(b) deliberate image weakening, ie introducing aspects of pack design which would make the pack seem less attractive to potential smokers.*
>
> *The use of plain packaging would have the effect of reducing images associated with use of particular brands. One possible method of reducing the sophisticated images cigarette companies build up around the packaging of each brand would be to have*

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*greater contrast between the warning material and the rest of the pack design. This contrast might be expected to interfere with pack image. Such a strategy would also be useful in increasing the noticeability of the warning information (see above). **CBRC Papers 10 and 13** address issues related to brand image."*

Given that s65C(2) seeks to balance the commercial interests of manufacturers and the protection of consumers we think that it is reasonably open to argument that the form of pack manipulation employed in connection with the warnings is excessive to that which is reasonably necessary.

Section 65D

Section 65D(1) prohibits the supply of goods which do not comply with a prescribed consumer product information standard. Breach of the prohibition gives rise to a criminal offence by virtue of s79 and also gives rise to civil remedies, under ss 80 and 82.

A consumer product information standard may arise from regulations authorised by s 65D(2) under s 172. Section 65D(2) provides that the regulations may make requirements as to the disclosure of "information relating to the performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of the goods ... as are reasonably necessary to give persons using the goods information as to the quantity, quality, nature or value of the goods".

Section 65D is not concerned with safety nor the prevention or reduction of risk of injury. Section 65D is concerned to ensure that consumers have information to enable them to make an informed choice as between competitive brands. For example, the standard could relate to date marking for the use of goods, empty space inside a package and uniform use of expressions such as "king-size". The purpose of s 65D is to induce standardisation in promotion to permit comparative choice by consumers. There is, however, some possible overlap between s65D and 65C.

There are two limitations on the power to make regulations prescribing a consumer product information standard, namely:

(1) the standard must relate to the matters listed, namely, the "performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of the goods"; and

(2) the standard both as to form and content, must be "reasonably necessary to give persons using the goods information as to the quantity, quality, nature or value of the goods".

As to the first limitation

The text proposed for publication on cigarette packs is in the nature of a health warning. In our opinion the text does not constitute information concerning the composition, methods of manufacture or processing, the design, construction, finish or packaging of the goods. The text

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may however be argued to concern the performance or contents of the goods. While recognising this argument we think that the health consequences of smoking cannot reasonably be said to concern performance in the context of s 65D. The text proposed for the side of the cigarette packs does, in our view, constitute information as to the contents of the goods. The information concerning the availability of a "Quit Line" does not, in our view, constitute information concerning contents, and in our opinion is beyond power.

As to the second limitation

The requirements of the standard must be "reasonably necessary" to give persons using the goods information as to the quantity, quality, nature or value of the goods. In view of the conclusions reached with respect to the first limitation the only question which remains for consideration is whether the proposed side of pack information satisfies this second limitation. The side of pack information concerns tar, nicotine and carbon monoxide levels and provides information with respect to those compounds. We think this information sufficiently relates to the nature of the goods to satisfy this limitation.

Summary

In conclusion:

(1) s 65D is of limited application but justifies the making of regulations concerning the information proposed for publication on the side of cigarette packs.

(2) s 65C does not justify the making of regulations requiring the publication of information concerning the availability of a "Quit Line" on cigarette packs.

(3) It is reasonably open to argument that the form the proposed warnings and in particular the area of the pack to be occupied by the proposed warnings is excessive and beyond power. This argument involves a consideration of the persuasiveness of the evidence relied on by government for the regulations (ie the CBRC Report), the commercial interests of manufacturers and the illegitimacy of pack manipulation to damage brand image when employed in the guise of a health warning.

If you would like to discuss this advice further or have any queries please let us know.

Yours faithfully
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Partner

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